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SUBJECT: ABORIGINAL LAND CLAIMS DEFY TIMELY RESOLUTION

REF: OTTAWA 594

¶1. (SBU) Summary: The recent imbroglio between the Canadian Border Services Agency and the Mohawk community of Akwesasne over armed agents at the crossing point on Cornwall Island, Ontario (reftel) highlights again the complexity, lack of clarity, and evolving nature of relations between the federal and provincial governments and Canada's aboriginal populations. Slow progress on self-government and land claims pose ongoing human rights challenges. As long as Canada lacks a clear legal definition of aboriginal titles and rights, effective mechanisms to resolve First Nations grievances in a timely manner will remain elusive. End summary.

A YOUNG AND GROWING COMMUNITY

¶2. (U) According to the latest census (2006), aboriginal Canadians -- Indians, Inuit, and Metis (persons of mixed aboriginal and European ancestry) -- number almost 1.2 million, or approximately 4 pct of the total population. "Status Indians" (Indians with federally recognized aboriginal status) constitute 60 pct of the aboriginal population, Metis 33 pct, and Inuit 4 pct. The aboriginal population increased by 45 pct from 1996 to 2006, nearly six times faster than the non-aboriginal growth rate. The median age of the aboriginal population is 27 years (compared to 40 years for non-aboriginal peoples) and 31 pct is under the age of 14. According to Statistics Canada, aboriginal peoples on average experience poorer health outcomes, worse housing conditions, lower rates of high school completion, and higher unemployment than the non-aboriginal population. In 2007-2008, aboriginals accounted for 22 pct of the adult incarcerated population.

¶3. (U) The federal Department of Indian and Northern Affairs (INAC) recognizes 615 First Nations (Status Indian) communities across all ten provinces and two territories. Canada's third territory, Nunavut, is an Inuit "homeland," in which 83.6 pct of the population is Inuit. Approximately 60 pct of aboriginal people in Canada now live off-reserve, up from 58 percent in 1996. Ontario has the largest aboriginal population (21 pct of the provincial population), but the four western provinces are home to 61 pct of the total aboriginal population.

¶4. (U) The 1876 Indian Act is the principal federal legislation defining aboriginal status, governance, and eligibility for federal benefits and services. INAC is responsible for the administration of the Act, along with another 58 laws relating to First Nations, and shares responsibility with other federal government departments for 17 other related statutes.

SELF-GOVERNMENT, NOT SOVEREIGNTY

¶5. (U) As an alternative to federal stewardship under the Indian Act, Canada acknowledges self-government as an "inherent" aboriginal right within the meaning of section 35(1) of the 1982 Constitution Act. Since 1982, the federal and provincial governments and aboriginal groups have attempted to negotiate a clearer definition of "aboriginal right" to add to the Constitution, but have failed to agree. In 1995, the then-Liberal federal government began including (in conjunction with provincial governments) proposals for aboriginal self-government as part of negotiations on comprehensive land claims as an alternative to potentially costly litigation.

¶6. (U) The "inherent" right of self-government does not grant a right of sovereignty in the sense of international law, and does not

create sovereign independent aboriginal nation states. Rather, federal guidelines underscore that First Nations exercise only self-government under the Constitution. The Canadian Charter of Rights and Freedoms also applies fully to aboriginal governments. In 2005, the government of British Columbia entered into a "New Relationship" with its First Nations based on accommodation of aboriginal title and rights and acknowledgement of aboriginal titles over much of the province. The B.C. provincial government subsequently proposed a "Recognition and Reconciliation Act," but has not yet tabled it in the legislature.

¶7. (U) All self-government agreements the federal government has signed with First Nations differentiate jurisdiction as follows:

- issues that are integral to distinct aboriginal culture (e.g. governance, status, language, culture, education, health, social services, law enforcement, resource management, taxation, and economic development) fall under the exclusive administration of aboriginal governments;
- areas where primary law-making authority remains with the federal and/or provincial government if in conflict with aboriginal law (e.g. environmental protection, natural resource co-management, penitentiaries, and emergency preparedness); and,
- areas that are not integral to aboriginal cultures, or internal to aboriginal groups, and where the federal government retains its exclusive law-making authority, including national defense and security, security of national borders, immigration, and international trade as well as "other national interest powers" such as regulation of the national economy, maintenance of law and order, health and safety, and transportation. In 2011, the federal government will also extend the Canadian Human Rights Act to First Nations people on reserves (including those under self-government agreements) for the first time.

CHANGING THE RELATIONSHIP

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¶8. (U) Lack of a standard model for resolving comprehensive land claims, self-government agreements, and the absence of a clear legal definition of what constitutes an "aboriginal right" have resulted in complex multi-year negotiations, a significant claims backlog, and friction between aboriginal communities and the federal and provincial governments. Even for completed treaties and agreements, litigation may still occur. INAC is the lead department tasked with negotiating and implementing land claims and self-government agreements with First Nations on behalf of the federal government. In 2003, some First Nations dissatisfied with the implementation of their treaties formed the Land Claims Agreements Coalition. Whereas the federal government regards completed comprehensive land claims treaties and self-government agreements as, in principle, the discharge of its obligations, members of the Land Claims Agreements Coalition have underscored that they see such agreements as not an end, but the beginning of new relationships, with ongoing federal obligations.

¶9. (U) According to INAC officials, court rulings have been the principal "game-changers" in recognizing aboriginal rights and giving aboriginal communities greater control over their own decisions. However, since 2006 the federal government under Prime Minister Stephen Harper has also promoted economic development and a more business-oriented approach as a new direction in its relations with aboriginal communities. PM Harper cancelled the 2005 Kelowna Accord negotiated by the previous Liberal government, which would have mandated federal spending of C\$5 billion over ten years on aboriginal social services. In June 2009, the federal government launched a new "Federal Framework for Aboriginal Economic Development," promising government collaboration, private sector partnerships, skills development, and easier access to capital. In August 2009, PM Harper used an Arctic tour to announce a new economic development strategy and creation of a new Canadian Northern Economic Development Agency (CanNor) in Iqaluit, Nunavut. The government's "Northern Strategy" emphasizes the role of aboriginal peoples in strengthening Canadian Arctic sovereignty, protecting the environment, and promoting economic and social development in the North.

¶10. (U) Some First Nations have also pushed to replace the Indian Act with more modern partnerships. In July 2009, chiefs across the country elected Shawn Atleo as the new National Chief of the

Assembly of First Nations on a platform of economic development, self-sufficiency, and tackling poverty. Bands in Atleo's home province of B.C. have built on land claims settlements, resource rights, and self-government agreements to launch businesses and generate new sources of revenue.

LAND CLAIMS: COMPREHENSIVE VERSUS SPECIFIC

¶11. (U) Aboriginal leaders have insisted that land and control over its resources are the key to self-sufficiency. There are two types of aboriginal land claims. "Comprehensive claims" deal with aboriginal rights and titles that have not previously been settled by treaty or other means. In these cases, the federal government negotiates new treaties. "Specific claims" deal with First Nations' grievances arising from alleged non-fulfillment of federal obligations under existing treaties or other legal obligations, or from the way the federal government has managed First Nations' funds or assets. Resolution may take the form of additions to existing treaties, transfers of land, cash, or resource rights. In 2008, the federal government had more than 60 separate ongoing negotiations for comprehensive land claims and more than 800 specific claims remained outstanding.

¶12. (U) The Crown signed more than 70 treaties with First Nations between 1701 and 1923. Subsequently, the federal government has negotiated and ratified 21 additional treaties covering 40 pct of Canada's land mass. The impetus for negotiation of comprehensive land claims stemmed from a landmark 1973 Supreme Court of Canada ruling confirming that aboriginal peoples' historic occupation of the land gave them legal rights not previously subject to treaties (principally in British Columbia, southern Alberta, and the Yukon). The federal government established processes to resolve comprehensive claims through negotiation in 1973 as an optional alternative to costly litigation. It signed the first comprehensive land claims agreement in 1975. The Constitution Act of 1982 (section 35 (1)) further "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."

¶13. (U) In October 2008, the federal government "retooled" the previous specific claims process to establish a new independent Specific Claims Tribunal to expedite cases. The Tribunal, composed of six provincial superior court judges selected in consultation with the Assembly of First Nations (Canada's largest aboriginal advocacy group), has the authority to make binding decisions on claims that have been rejected for negotiation, or where negotiations fail, on claims up to C\$150 million (approximately \$140 million). It has not yet publicly registered any judgments.

¶14. (SBU) COMMENT: Canadian courts have been the primary drivers of federal and provincial efforts to resolve aboriginal grievances, both in imposing new obligations and in encouraging negotiations to preempt litigation. However, as long as Canada lacks a clear definition of aboriginal rights or a uniform model for negotiations,

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effective mechanisms to resolve aboriginal grievances in a timely manner will remain elusive.

HOPPER